

FILED
12/01/2005

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CLERK U.S. DISTRICT COURT
WEST. DIST. OF PENNSYLVANIA

ROBERT EARTHMAN,
PETITIONER,

. Civil No.: 05-188 (Erie)
. Judge: Sean J. McLaughlin
. Mag. J.: Susan Paradise Baxter

-v-

JAMES F. SHERMAN,
RESPONDENT.

. MOTION FOR RELIEF PURSUANT TO
. TITLE 28 U.S.C. § 2241

**PRO-SE REPLY TO RESPONDENT'S SECOND RESPONSE (SURREPLY)
TO WRIT OF HABEAS CORPUS**

Now comes the petitioner, Robert Earthman, pro-se, to reply "again" to the respondent who has without permission filed a second response.

First, the petitioner argues that this Honorable Court should stink the respondent's "second bite at the apple," being that the respondent did not have permission to file additional /or amended responses and cause undue delay in this matter. Secondly, the petitioner argues that even if this Honorable Court allows the filing of the respondent's "additional" surreply, this Honorable Court should reject the respondent's position for the reasons set forth in his reply brief. In this matter, as stated before

the Supreme Court ruling in Lopez -v- Davis, 531 U.S. 230 (2001), is unlike the facts in this matter where this defendant " did not and could not" receive a two-point firearm enhancement with his felony conviction pursuant to 2D.1(b)1 based on his "actual innocence" of that conduct.

The petitioner states, that it must be remembered that under 2D.1.1 he has a due process right to be proven of that enhancement offense and in this matter, the petitioner challenges the factors of that enhancement. See U.S. -v- Cooper, 111 F.3d 845 (11th Cir. 1997); U.S. -v- Hankins, 329 F.Supp.2d 1225,1236 (D.Mont. 2004).

Now, in the present case, the petitioner is being denied his Sixth Amendment Right, where he is being denied a finding of this fact by a preponderance of the evidence.

Therefore, based on the reasoning of the petitioner's first reply, this Honorable Court should grant the relief sought.

Respectfully Submitted,


Robert Earthman

CERTIFICATE OF SERVICE

I certify that a copy of this second reply was sent to Christy Hiegard, Asst. Attorney at U.S. Courthouse and Post Office 700, Grant Street, Suite 400, Pittsburgh, PA 15219, by U.S. mail on this 21 day of November, 2005, with correct postage paid.

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